



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 27, 1998

Ms. Sylvia Salazar
Staff Attorney
Texas Department of Insurance
Legal and Compliance
MC 110-1A
P.O. Box 149104
Austin, Texas 78714-9104

OR98-0809

Dear Ms. Salazar:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID#113704.

The Texas Department of Insurance (the "department") received a request for the individual insurer data submitted in response to the May 20, 1997, Private Passenger Automobile Trend Data Survey. You state that the industry level summary has been released. However, you explain that the company level data may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the department, and make no arguments regarding the proprietary nature of the requested information. You have submitted for our review a representative sample of the companies' responses.¹

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified the insurance companies whose company information was requested. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

applicability of exception in Open Records Act in certain circumstances). This office has received six responses to the notification. They include: Texas Farmer's Insurance Company, United Services Automobile Association, Nationwide Insurance, Travelers Property Casualty, Government Employees Insurance Company and Southern Farm Bureau Casualty Insurance Company.

Some of the ten companies involved did not respond to our notice; therefore, we have no basis to conclude that these companies' information is excepted from disclosure. See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. The company level data for Allstate Insurance Group, Unitrin, Inc., Safeco Insurance Group, and State Farm Group must, therefore, be released to the requestor.

Several of the responding companies argue that sections 552.101, 552.104, and 552.112 of the Government Code except the requested information from disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." We note that a Travis County district court issued a temporary restraining order enjoining the department from releasing quarterly market reports. *National Ass'n of Indep. Insurers, v. Morales*, No. 97-09206 (98th Dist. Ct., Travis County, Tex., Oct. 13, 1997). However, it does not appear that the order governs the requested data. Therefore, we conclude that the information may not be withheld based on section 552.101.

Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Likewise, we do not believe that section 552.112 is applicable in this instance. The department does not seek to withhold the information at issue based on this section. Therefore, the requested information may not be withheld pursuant to section 552.104 or 552.112.

Finally, each of the responding companies raises section 552.110 as an exception to disclosure of its information. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.²

After reviewing the arguments of each company, we believe that the following companies have made a *prima facie* demonstration that their information must be protected as a trade secret: Texas Farmer's Insurance Company, United Services Automobile Association, Travelers Property Casualty, and Southern Farm Bureau Casualty Insurance Company. We note, however, that the requestor has raised relevant disputed factual and legal issues, including whether the company level data at issue has been publicly revealed. If the information has already been publicly revealed, then the companies cannot, arguably, protect the information from further disclosure as trade secret information. This office cannot resolve disputes of fact in the opinion process. *See* Open Records Decision No. 609 (1992). We, therefore, defer ruling on the issues concerning the secrecy or confidentiality of the information at issue. We refer these questions back to the department to make findings on the issues raised. If the department makes findings that the information at issue constitutes a trade secret or commercial or financial information, it must be withheld. If the

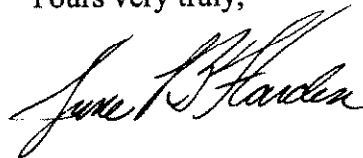
²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

department determines that this information does not constitute a trade secret or commercial or financial information, it must be released. In addition, we note the existence of other appropriate avenues for resolving these factual and legal disputes. *See, e.g.*, sections 552.321, 552.324, and 552.325 of the Government Code.

Neither Nationwide Insurance or Government Employees Insurance Company demonstrated that their company level data was protected from disclosure under section 552.110. Therefore, the department must release their company level data to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "June B. Harden". The signature is fluid and cursive, with the first name "June" being more prominent.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/glg

Ref.: ID# 113704

Enclosures: Submitted documents

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